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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

November 9, 1994

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Stop Code 1170
Washington, D.C. 20554

Re: Ex Parte Submission
PR Docket No. 93-61
Automatic Vehicle Monitoring

Dear Mr. Caton:

On behalf of Southwestern Bell Mobile Systems ("SBMS"), I am filing the original and one copy of this written ex parte communication pursuant to Section 1.1206(a)(1) of the Commission's Rules.

Very truly yours,

Louis Gurman

Louis Gurman

No. of Copies rec'd 0+1
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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of	)	PR Docket No. 93-61
the Commission's Rules	)	RM-8013
to Adopt Regulations for	)	
Automatic Vehicle Moni-	)	
toring Systems	)	

EX PARTE COMMENTS OF
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

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November 9, 1994

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SUMMARY

In these comments, Southwestern Bell Mobile Systems, Inc. ("SBMS") states and explains its views on two fundamental issues in this rulemaking proceeding. First, SBMS explains why competitive bidding will resolve the principal substantive issues (other than co-existence with the Part 15 community) which have dominated this rulemaking but which are as far from resolution today as they were when the Notice of Proposed Rulemaking ("NPRM") in this proceeding was first released. These comments also describe how the Commission should deal with interim licensees-- either those whose wideband systems remain unconstructed pursuant to grants of extended implementation or those whose systems are or will be (on the effective date of permanent rules) operational-- assuming the auction regime proposed here is adopted.

Auction Proposal

Wideband AVM/LMS auctions will replace current, unsuccessful attempts to reach consensus by filing comments, holding meetings, conducting negotiations, etc. with a simple, immediate, market-based test forcing participants to substantiate their self-professed, infallible need for a minimum increment of AVM/LMS spectrum by expending real dollars to acquire this extremely scarce resource. By assigning AVM/LMS spectrum to the party paying the most for it, auctions ensure that scarce bandwidth will be assigned to the party that values it most and, as a result, who will utilize it in a way that maximizes its value. Auctions also save society the costs incurred by other license assignment methods, while

generating cash with which to offset government deficits and providing up-to-date, market-based valuation data on the spectrum being auctioned.

The auction proposed here has the following characteristics:

- Market Definition-- BTAs (notwithstanding SBMS's preference for MSAs/RSAs);
- Bandwidth Increment-- reverse link spectrum will be auctioned in building blocks of two MHz (or at least some of the building blocks should be two MHz);
- Forward Links-- permanent licensees emerging from the reverse link auction will be entitled to a 250 kHz forward link; and
- Construction Period-- coverage to twenty (20) per cent of the BTA will have to be achieved within twelve (12) months, and fifty (50) per cent within thirty-six (36) months; quantitative performance standards must also be achieved.

Interim Licensees

To achieve the public interest benefits attending the auction regime discussed here, the Commission must dispose of the vast number of interim licenses granted pursuant to extended implementation plans, as follows: first, by cancelling all extended implementation licenses which, on the date permanent rules become effective, have expired under Section 90.155 of the Rules and remain unconstructed; and second, by grandfathering all interim incumbents who completed construction (or who do so within the period provided by Section 90.155) for a transition period equal to the later of (i) fifteen months following release of a Report and Order or (ii) the date upon which a conflicting auction winner notifies the Commission that it is ready to commence commercial

service in the pertinent band. After the transition period, these incumbents must relinquish their spectrum. If the Commission deems it appropriate, it may wish to consider a bid credit of some magnitude to incumbents who timely constructed facilities in a market in which they bid. Any such credit would not necessarily have to be of the same magnitude as a pioneer's preference unless the Commission believed that the incumbent had demonstrated comparable innovation and spectral efficiency.

The Commission's authority to modify interim licenses by terminating extended implementation schedules in the manner described above is indisputable. First, the Commission clearly has power to modify a license in the course of a notice and comment rulemaking proceeding. Moreover, the "interim" license holders, by definition, accepted their authorizations with full knowledge that under the 1974 Report and Order and Section 90.239 of the Rules, their licenses were subject to whatever changes the Commission might make upon adoption of permanent rules. Even prior to release of the NPRM, waivers granted to Teletrac to relax service limitations (i.e. granting the right to provide service to animate objects and individuals) stated that the underlying authorizations were interim and that the waivers were subject to the outcome of any future proceedings that would adopt permanent AVM rules. Extended implementation schedules granted subsequent to release of the NPRM were expressly conditioned on the outcome of the instant proceeding. (An interim licensee cannot accept the benefits of a Commission grant while denying the conditions upon which that grant

was made.) The Report and Order adopting the interim rules stressed that they were indeed "interim" and that the data and experience generated from systems operated pursuant to corresponding interim licenses would ". . . more clearly define spectrum requirements and operational standards for AVM as appropriate for future Commission action." (Emphasis added); see also 47 C.F.R. §90.239(e)(4) ("Pending development of further specific technical standards for AVM systems, the Commission, on a case-by-case basis, may impose additional appropriate technical requirements to assure efficient and effective frequency utilization.")

Finally, no interim licensee has an equitable claim to retaining its extended construction schedule beyond the effective date for permanent rules or the lapse of its construction term under Section 90.155. Such retention would subvert the Commission's well-defined policy goals for wideband AVM/LMS by: (1) establishing wideband AVM/LMS as a monopoly or duopoly service in most major markets; (2) compromising or eliminating the multiple public interest benefits attending implementation of an auction selection process and (3) encouraging evisceration of an established rule, i.e., Section 90.155, by waiver.

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EX PARTE COMMENTS OF
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Southwestern Bell Mobile Systems, Inc. ("SBMS"), by its attorneys, hereby submits the following ex parte comments in the above-referenced proceeding. These comments have two purposes: to amplify and refine certain proposals and concepts set forth in SBMS's letter to Ralph A. Haller dated August 12, 1994 in this proceeding (hereinafter "SBMS August 12 Letter"); and to reply to certain written ex parte comments that were subsequently filed by Airtouch Teletrac ("Teletrac") and MobileVision, L.P. ("MobileVision").

To realize these objectives, SBMS will focus on the following two issues in the ongoing debate concerning an optimal scheme for wideband AVM/LMS licensing and regulation:

- spectrum allocation and assignment mechanism;[1/] and

[1/] A Final Report of the Mobile and Portable Radio Research Group of Virginia Tech containing a scientific evaluation of alternate AVM/LMS operating systems and technologies was placed on file (continued...)

- disposition of interim wideband AVM authorizations issued pursuant to extended implementation.

I- INTRODUCTORY STATEMENT

The attempt to fashion permanent AVM rules was formally initiated on April 9, 1993 when the Notice of Proposed Rulemaking ("NPRM") in this proceeding was released.[2/] Since that time, this docket has witnessed the filing of initial and reply comments, numerous ex parte conferences involving commenting parties and Commission personnel, multiple ex parte written submissions, a Public Notice requesting public comment on the ex parte submissions, an extension of that comment period, additional written comments, and subsequent rounds of ex parte discussions and filings. In addition, wideband AVM/LMS proponents, including SBMS, have attempted, in private discussions among themselves, to resolve the issues raised by the NPRM.

Despite devoting thousands of hours (and dollars) to these efforts, the most active advocates of wideband AVM/LMS systems and technology candidly recognize that there is little common ground among them. Indeed, these parties appear no closer to agreeing on

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[1/](...continued)
October 19, 1994 ("Final Report"). See Letter of Louis Gurman to William F. Caton, dated October 19, 1994. The Final Report should assist the Commission in developing a band plan that maximizes spectrum efficiency and opportunities for competitive entry.

[2/] Notice of Proposed Rulemaking in PR Docket No. 93-61, 8 FCC Rcd 2502 (1993). Technically, this proceeding originated on May 28, 1992 when the Petition for Rulemaking that precipitated the NPRM was filed by North American Teletrac and Location Technologies, Inc. ("Teletrac").

the essential regulatory components of AVM/LMS service, and this rulemaking's principal issues appear no closer to consensus resolution, than they did in April 1993 when the NPRM was first released.

SBMS respectfully submits that the Commission needs to acknowledge that there is no solution to the essential, disputed issues which all or a majority of the wideband proponents will voluntarily accept. Given these irreconcilable views, the Commission must shift its current focus, however well-intentioned, from attempting to accommodate the disparate private interests that have controlled the present debate to reaching decisions that advance the Commission's stated policy objectives for wideband AVM/LMS service. By replacing its constant (and laudable) interest in accommodation and consensus with its own determination regarding the public's interest in wideband AVM/LMS, the Commission will succeed in resolving the difficult issues impeding this rulemaking, notwithstanding predictable intransigence of certain major parties herein.

II- WIDEBAND AVM/LMS SPECTRUM SHOULD BE ASSIGNED IN SMALL BUILDING BLOCKS BY AUCTION

The Commission should decide how much bandwidth it will allocate to wideband AVM/LMS service and then assign that resource to prospective operators in the smallest building blocks feasible for efficient use through a process of competitive bidding.[3/]

[3/] In its Notice of Proposed Rulemaking in PP Docket No. 93-253, 8 FCC Rcd 7635, 7660, n. 153 (1993), the Commission stated that (continued...)

Assuming the auction concept is endorsed in principle by the Commission, only the following implementation issues will remain to be determined:[4/]

[3/](...continued)
there were "fundamental questions" concerning application of auctions to AVM:

> [I]t appears that because AVM frequencies are shared with the government . . . the principal use of these frequencies might not be for the provision of service to subscribers for compensation, as required by Section 309(j). Id. at 89, n.153 (emphasis added).

The Commission deferred this "fundamental question" in the Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) pending further action in the instant docket. Nevertheless, the sharing of frequencies between wideband AVM/LMS and government is irrelevant to the "principal use" test imposed by Section 309(j)(2) of the Communications Act. Rather, the issue is which use-- government or wideband AVM/LMS-- will account for at least a majority of the target spectrum's available capacity. Because wideband proponents envision thousands of subscribers engaging in thousands of transactions utilizing the subject bandwidth, there appears little doubt that a preponderance of the capacity will be devoted to AVM/LMS. Accordingly, the "principal use" test of Section 309(j)(2) will be satisfied. See 9 FCC Rcd at 2354 (¶ 34) ("In order to determine the principal use in a service, we proposed to compare the amount of non-subscription use made by the licensees in a service as a class with the amount of use rendered to eligible subscribers for compensation on the basis of information throughput, time, or spectrum. At least a majority of such use would have to be for service to subscribers for compensation in order for a service to be subject to competitive bidding. . . . This approach found support in the comments . . . and we adopt it.") (footnote omitted).

[4/] Co-existence between Part 15 users and wideband AVM\LMS providers in the 902-28 MHz band remains a concern, but one which can be resolved through cooperation under the existing band hierarchy. While the parties hope to structure some limited testing between Pinpoint Communications, Inc. and Part 15 users in the near future, SBMS believes that meaningful testing would have to include field tests of interference between different types of the Part 15 community and would require five or six months. Interference among different types of users within the Part 15 (continued...)

- market definition;
- minimum unit of spectrum available for bid;
- assignment of forward link spectrum;
- maximum construction period; and
- disposition of all interim wideband AVM authorizations issued pursuant to extended implementation.

The first four issues are discussed below. (How the Commission should dispose of extended implementation authorizations, for both constructed and unconstructed wideband systems, is discussed in Section III of these comments.) First, however, we explain why auctions will be so effective in settling the seemingly intractable disputes that have stymied this proceeding and will thereby accelerate public availability of wideband AVM/LMS service.

A. Wideband Auctions Will Summarily Resolve The Major Dilemmas Of This Proceeding

Since this proceeding's inception, the parties and the Commission have attempted to resolve how much spectrum in the 902-928 MHz band should be assigned to wideband AVM/LMS, the number of wideband licensees per market, and the bandwidth allotted to each licensee. Despite a year and a half of wrangling, consensus on these issues is non-existent. Accordingly, no Commission decision

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[4/] (...continued)
community, particularly interference caused by high powered equipment, may actually be worse than (and, in fact, exacerbate) the interference between wideband AVM operators and Part 15 users. Accordingly, any regime of testing which purports to be comprehensive would have to include Part 15 testing as well. In the interim, SBMS will continue to lend its resources and expertise to ongoing efforts to find common solutions.

will please all the participants-- there will be winners and losers based solely upon the Commission's perception of the relationship between the parties' respective positions and the "public interest."

By mandating auctions, however, the Commission will entrust these critical policy decisions to the marketplace, where they will be resolved by economic logic not bureaucratic fiat. To the prospective wideband operator that proclaims an absolute, unequivocal need for six (or eight or twelve) MHz to construct and operate a viable wideband AVM/LMS system, an auction regime compels that party to equilibrate its rhetorical passion with monetary sacrifice (i.e., put your money where your mouth is).

This constraint, coupled with a reasonable construction requirement, constitute the most powerful and efficient protection against spectrum stockpiling/warehousing, and insincere applicants. Moreover, because auctions are the most condensed of the available licensing mechanisms for mutually exclusive applications, mandating their use for wideband AVM/LMS will ensure rapid availability of nationwide service.[5/]

The other benefits of auction-based assignments are well-known. By assigning AVM/LMS spectrum to the entity ready and willing to bid the most for it, auctions guarantee that this resource will be used in a way that maximizes its value.[6/] As a

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[5/] Kwerel and Felker, "Using Auctions to Select FCC Licensees, " OPP Working Paper Series No. 16, May 1985 at 12.

[6/] Second Report and Order in PP Docket No. 92-253, 9 FCC Rcd at 2361.

result, wideband AVM/LMS auctions will promote the development and rapid deployment of new services and efficient and intensive use of the spectrum designated for this use.[7/]

Auctions also save society the substantial private costs (for lawyers, engineers, economists) that invariably are expended in filing and prosecuting FCC applications under alternative license assignment methods.[8/] Indeed, under an auction system, these expenditures are used to pay the winning bid to the government and, as a result, are available for social (rather than individual) benefit. In addition, auctions conserve FCC resources while eliciting the market's current valuation of the spectrum being auctioned.[9/]

[7/] Id. In a letter to the Commission, dated October 13, 1994 (hereinafter "MobileVision October 13 Letter"), MobileVision asserts that AVM/LMS auctions "will permit success to only those who idly sit by with the larger purse awaiting the opportunity to bury private innovators in a (sic) an avalanche of auction dollars.") MobileVision October 13 Letter at 4. Inflamed rhetoric aside, this unsupported claim defies the common sense notion that a high bidder is, by financial necessity, the most motivated to develop, improve and enhance a resource acquired by auction. MobileVision's inference that auctions benefit only those with the "larger purse" has absolutely no empirical support; indeed, an objective analysis of various license assignment methods concluded that ultimate "ownership distributions would not be significantly changed if initial authorizations were awarded by auction." Kwerel and Felker, OPP Working Paper at 10.

[8/] Kwerel and Felker, OPP Working Paper at 13.

[9/] Id. at 14-15 ("The amount bidders are willing to pay for a license reflects their estimates of the value customers place on the service they propose to provide. The Commission should consider reallocating spectrum to the higher valued use if it were to find that the bids on licenses for one use greatly exceeded the bids on licenses for similar spectrum allocated to another use") (footnote omitted).

All these benefits, plus the unmistakable inability of the parties in this docket to resolve their differences, commends auctions as the optimal license assignment mechanism for wideband AVM/LMS.

B. Specific Features of Wideband Auctions

To implement competitive bidding for wideband AVM/LMS, the Commission must define the exact authority it is auctioning and any conditions associated therewith. To do this, the Commission must determine optimal market size, total amount of spectrum available per market, incremental unit of bandwidth for which bids will be accepted, and construction/performance conditions attaching to authorizations assigned pursuant to this process.[10/]

Market Definition-- For reasons that need not be addressed here, SBMS has long advocated using MSAs and RSAs as the basic market area for assigning wideband AVM/LMS spectrum. Notwithstanding this preference, SBMS is willing to define wideband AVM/LMS markets on the basis of BTAs, rather than MSAs or RSAs. Considering that BTAs account for four of the six broadband PCS allocations, the Commission may reason that there are public

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[10/] Another issue relevant to implementing auctions is the scope of services that may be provided on the allocated spectrum. As stated in the SBMS August 12 Letter (at 6), AVM/LMS must remain primarily non-voice if the Commission's original intent with respect to this service is to be fulfilled. NPRM, 8 FCC Rcd at 2503. Unless voice service is strictly limited to a "truly ancillary" role, there can be no doubt that wideband AVM/LMS spectrum will be transformed into another competitive PCS service with potentially adverse consequences for upcoming PCS auctions.

interest benefits for adopting BTAs as the licensing standard with respect to wideband AVM/LMS.

Minimum Quantity of Spectrum-- Once the Commission decides the total bandwidth to be allocated to wideband AVM/LMS-- i.e., 16 MHz, 12 MHz, or something else-- it must then determine in what increments that bandwidth will be offered in each BTA (or MSA or RSA) in which auctions are held.

Smaller increments will enable prospective bidders to acquire the minimum quantity of spectrum needed to implement their wideband systems in a particular BTA, while allowing multiple wideband competitors to vie for customers in the marketplace. As a result, proponents of spectrally efficient wideband technology will realize a distinct cost advantage relative to their less efficient rivals, and the longstanding Commission objective of preserving scarce spectrum will be maximized.[11/]

As discussed in the SBMS August 12 Letter (at 5), the wideband AVM/LMS system SBMS has constructed and is presently operating in Chicago occupies only two MHz for its reverse link (and only 50 kHz for the forward link).[12/] This model suggests that two MHz may be

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[11/] Small spectrum increments promote efficiency by minimizing the occurrence of fallow spectrum. If reverse link AVM/LMS spectrum were auctioned in increments of four MHz, then systems requiring two, six or ten MHz of bandwidth would each idle two MHz of scarce spectrum. By contrast, if the bidding increment were two MHz, no bandwidth would be rendered fallow and the number of service providers might increase. If the Commission deems it appropriate, it may wish to consider a spectrum cap to assure that there are opportunities for at least two market entrants.

[12/] As far as SBMS can determine, every wideband AVM/LMS proponent in this docket advocates an allocation scheme involving an integral

(continued...)

the optimal increment for purposes of structuring wideband auctions. By offering AVM/LMS bandwidth in discrete packets of two MHz each, the Commission will confer on prospective operators deploying spectrally efficient technologies a substantial advantage in start-up costs which can be dispensed to consumers in the form of lower rates.

Of course, entities (including SBMS) intent on operating with more than two MHz should be able to bid for and acquire multiple two MHz blocks in a single BTA. This option provides maximum flexibility for all AVM/LMS technologies and, from a prospective bidder's perspective, may even enhance the value of the spectrum being auctioned.[13/] At a minimum, should the Commission decide that

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[12/](...continued)
multiple of two MHz (i.e., 4, 6, 8, 10 and 26 MHz). Thus, the claim in MobileVision's October 13 Letter (at 5) that there is "no basis in the record" for auctioning AVM/LMS spectrum in discrete two MHz blocks is incorrect-- all major proponents can be accommodated with two MHz auctions, while ensuring that no spectrum lies fallow simply because conventional wisdom regarding the minimum bandwidth needed for an AVM/LMS system subsequently proved inflated.

MobileVision's further claim that "economic utility" of this auction "would only exist for those who would create a limited location service adjunct and dependent on cellular" is similarly ill-conceived. The SBMS Quiktrak system in Chicago, for example, is fully-featured, robust, and offers all the safety and security characteristics the Commission intended for this service, although it presently requires only two MHz for its reverse links. Moreover, Quiktrak technology is independent of, and neither uses nor interfaces with cellular technology or facilities.

[13/] MobileVision's October 13 Letter (at 6) asserts that, by judicious timing of bids, an entity seeking only two MHz could "raise the price of any such 6 MHz sub-band artificially." This claim completely ignores the fact that fair auctions, by definition, are insulated from bad faith bids as MobileVision predicts by each bidder's awareness that such conduct can result in
(continued...)

increments of spectrum larger than two MHz should be made available in deference to certain existing technologies, at least some of the spectrum building blocks should be offered at 2 MHz.

Conceivably, a good faith auction participant could acquire two (or more) non-adjacent blocks of spectrum in a single BTA. The Commission should allow such a winning bidder to rearrange and consolidate its holdings by swaps and other transactions with similarly-situated parties. For this reason, wideband AVM/LMS authorizations awarded through auctions should be freely alienable.

Forward Link Spectrum-- Even if the wideband reverse link is auctioned, the Commission will still have to determine how it will assign companion forward link bandwidth to successful bidders. In this case, the most straightforward method is also most advantageous from a public policy perspective.

Simply stated, the Commission should establish blocks of forward link spectrum for assignment to the licensees who emerge from the reverse link auctions proposed above. In contrast to their disparate views over the appropriate bandwidth for reverse links, the principal wideband advocates generally agree that 250 kHz is optimal for forward links. Accordingly, SBMS proposes that each wideband AVM/LMS licensee in a particular BTA should be entitled to 250 kHz for forward links.

[13/](...continued)
the bidder's having to pay for something it neither wants nor can put to productive use. This is the only way, under the SBMS proposal, that any of the two MHz increments will go fallow-- other than a lack of bidder interest (in which case the spectrum can be auctioned for another use, an optimal result when spectrum is assigned according to market principles).

Assigning forward link bandwidth to AVM/LMS licensees, as proposed here, will minimize or eliminate administrative costs associated with this aspect of wideband licensing, while ensuring that a successful bidder can construct and operate its system without delay. Moreover, it will preclude speculation or "rent-seeking" with respect to forward link spectrum.[14/]

Construction Period-- Assuming the Commission adopts BTAs as the applicable market area, some compromise between the strict eight month construction period applicable to Part 90 facilities generally and the five year extended implementation intervals accorded current licensees and applicants must be achieved. As discussed in SBMS's August 12 Letter (at 11), eight months is simply too condensed a time frame to construct a system providing substantial service to an area as extensive as a BTA. On the other hand, a five year extended construction period cannot be reconciled with the requirement for "appropriate deadlines . . . to prevent stockpiling or warehousing of spectrum by licensees or permittees . . ."[15/]

Considering the above, SBMS proposes the following construction/performance requirements for auction-assigned AVM/LMS licenses for BTAs. Within twelve months of grant, the operator must provide service to at least twenty (20) per cent of the

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[14/] In this context, the term "rent-seeking" connotes private pursuit of government licenses, and generally refers to directly unproductive, profit-seeking activities. See Kwerel and Felker, OPP Working Paper at 13, n. 21.

[15/] Section 309(j)(4)(B) of the Act.

geographic area covered by the BTA; within that area, eighty (80) per cent of all location attempts must be successful and ninety-five (95) per cent of these successful attempts must have an accuracy equal or exceeding 100 meters. In addition, licensees would also be subject to a thirty-six month benchmark of fifty (50) per cent geographic coverage in which eighty (80) per cent of all location attempts are successful and ninety-five (95) per cent of these successful attempts are accurate within 100 meters.

Licensees failing to achieve these construction/performance standards could be subject to various enforcement actions, including fines, reductions in the geographic scope of their authorizations, and loss of renewal expectancy.

III- UNCONSTRUCTED, EXTENDED IMPLEMENTATION WIDEBAND AUTHORIZATIONS SHOULD BE CANCELLED

Assuming the Commission elects to adopt spectrum auctions for wideband AVM/LMS, the status of hundreds of interim authorizations for unconstructed AVM facilities for which the Commission granted extended (i.e., five year) implementation periods represents a grave and substantial threat to the auction system's success and to its ability to achieve the myriad public interest benefits outlined earlier. Accordingly, SBMS proposes that the Commission:

- cancel extended implementation schedules for all interim authorization holders who, on the date permanent rules become effective, have failed to complete construction and whose Section 90.155 construction periods have expired; and

- transition all interim incumbents who have completed construction (or who do so within the period provided by Section 90.155) to the

> new allocation scheme for a period terminating on the later of 15 months following adoption of the order or the date upon which a conflicting auction winner notifies the Commission that it is ready to commence commercial service; thereafter, these incumbents must relinquish their assignments.[16/]

The 902-28 MHz bandwidth released by implementation of these proposals should be diverted to and assigned by auction.[17/] Incumbents who require more than the two MHz they can retain under this proposal will be able to bid for that spectrum in the AVM/LMS auctions contemplated herein.

As shown below, neither legal nor equitable grounds support preserving unbuilt wideband AVM authorizations and insulating the underlying spectrum from competitive bidding. Moreover, maintaining existing extended implementation schedules or granting

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16/ As discussed earlier, SBMS's Quiktrak system in Chicago requires two MHz for reverse links, and two MHz may be an "optimal increment" in terms of assigning AVM/LMS bandwidth by auction. Moreover, under SBMS's instant proposal, the licensees who emerge from the AVM/LMS auction will be entitled to a forward link allotment. If the Commission deems it appropriate, it may award a bid credit of some magnitude to incumbents who timely constructed. A bid credit regime would be somewhat analogous to a narrowly tailored "pioneer's preference" that recognizes the risks assumed by those who constructed and operated interim systems without distorting the entire bidding process by according a huge financial advantage to some prospective competitors without any corresponding public interest benefit. It should be borne in mind, however, that unless a specific incumbent's record of innovation (as opposed to longevity in holding licenses) warrants it, such credits need not be on a scale comparable to discounts awarded to those who have qualified for pioneer's preferences.

17/ MobileVision's October 13 Letter (at 2) asserts that the "basic concepts" proposed by Private Radio Bureau staff last August included "grandfathering of existing licensees." However, the staff's informal proposals related only to the issues of allocating two six MHz sub-bands to AVM/LMS and co-existence with Part 15 users.

new ones will frustrate the auction system and prevent it from achieving its inherent public policy benefits.[18/]

A. Cancelling Extended Implementation Schedules Is Within The Commission's Legal Authority

Commission authority to modify existing licenses within the context of a rulemaking proceeding conducted in accordance with the Administrative Procedures Act, 5 U.S.C. §551 et seq., is well-settled. Because the Commission has closely adhered to this statute here, cancelling extended implementation schedules and grandfathering incumbents as proposed here is within its legitimate authority. Moreover, since the NPRM's release, interim wideband AVM authorizations and attendant extended implementation schedules have been granted expressly subject to this docket's outcome, as documented below.

For these reasons, the Commission's authority to cancel the outstanding extended construction schedules beyond the eight months already provided in Section 90.155 is beyond dispute.

License Modification-- It is by now well settled that the Commission can use notice and comment rulemaking proceedings to

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[18/] This proposal applies solely to extended construction schedules associated with existing interim wideband authorizations, which involve shared spectrum and self-defined coverage areas. For this reason, there is no inconsistency between cancelling these schedules, while introducing a construction period exceeding eight months for new, BTA-based wideband authorizations assigned pursuant to auctions, as SBMS advocates above.

modify existing licenses if the rules adopted are otherwise valid.[19/] Its ability to do so:

> rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for the sound evolution of policy . . . and that such rule making is not to be shackled . . . by the importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.[20/]

Admittedly, Section 316(a)(1) of the Communications Act provides that the Commission may modify a station license or construction permit in the public interest, but only if the licensee has been given written notice thereof and a reasonable opportunity to protest the modification.[21/] Assuming those rights

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[19/] Memorandum Opinion and Order on Reconsideration in CC Docket No. 90-6 (Cellular Unserved Areas), 8 FCC Rcd 1363, 1364 (1993); see Upjohn Co. V. Food and Drug Administration, 811 F.2d 1583, 1584-85 (D.C. Cir. 1987), citing United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); American Airlines, Inc. v. CAB, 359 F.2d 624, 628-29 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966); California Citizens Band Association V. United States, 375 F. 2d 43, 50-52 (9th Cir. 1967).

[20/] American Airlines, Inc. v. CAB, 359 F.2d at 628-29.

[21/] Section 316(a)(1) provides in pertinent part that:

> Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity . . . . No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action . . . and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification.

Prior to 1983, Section 316 afforded licensees both written notice and a hearing before a modification could become final. Replacing the hearing right with a thirty day period to file a protest, the 1983 amendment (P.L. 98-214, 97 Stat 1467, §4, Dec.

(continued...)

are not infringed, the Commission has discretionary authority to modify licenses without approval of their holders.[22/] The role of notice and opportunity to protest is to afford a licensee the chance to participate in any modification order promulgated by the FCC. The rulemaking procedures employed in this docket amply satisfy that objective.[23/]

There can be no doubt that the NPRM gave wideband licensees and permittees with extended construction schedules notice that departures from Section 90.155 would be eliminated under permanent rules:

> Currently LMS licensees must construct and place their systems in operation within eight months from the date the license is granted. [footnote omitted][24/] . . . [W]e

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[21/](...continued)
8, 1983) was part of a then current trend, evident in both the courts and the legislature, to curtail the rights afforded licensees by this statutory provision.

[22/] Rainbow Broadcasting Co. v. FCC, 949 F.2d 405, 410 (D.C. Cir. 1991).

[23/] See California Citizens Band Association V. United States, 375 F. 2d at 50-52; affirmed, WBEN, Inc. v. United States, 396 F.2d 601, 618 (1968).

[24/] The omitted footnote pertinently states that:

> Any waivers granted by the Licensing Division to permit extended implementation will, however, remain in effect. Pending a Report and Order in this proceeding, we do not anticipate granting any new waivers of the eight-month construction requirement absent extraordinary circumstances. Additionally, because of the scope of this proceeding all AVM licensees should be aware that final rules adopted may require any licensee . . . to modify its operations.

8 FCC Rcd at 2507, n. 56. The first sentence above is vague-- it fails to indicate how long such waivers will "remain in effect[,]"
(continued...)

> currently have no provision for extended implementation of radio systems that operate on shared channels, and we are not inclined to introduce such a concept in this service. [footnote omitted] . . . [W]e do not want frequencies to appear more congested than they really are because of licensees that do not construct. . . . Accordingly, we propose to retain the eight month construction and placed in operation requirement.[25/]

Although the Commission ambiguously and inconsistently suggests that existing implementation schedules will remain effective, existence of the multitude of extended schedules already allowed under the interim rules will overwhelm and subvert the prospective ban that the quoted text plainly envisions.[26/] Failure to acknowledge this incompatibility and apply the ban both retrospectively and prospectively will leave many (or most) incumbent holders of interim authorizations with longer implementation schedules and, hence, more valuable license interests than those parties who prevail at auction and pay cash for their grant.

[24/](...continued)
i.e. until or beyond the Report and Order. Further, the rationale for the policy stated therein-- that new waivers will not be granted pending this proceeding's conclusion-- has been undermined by the Commission's blanket grant of an extended buildout for one hundred or more new Teletrac facilities without any showing of "extraordinary circumstances." Finally, any precedential effect the referenced sentence may have is materially diluted if not nullified by the admonition that "any licensee" might be required to modify its operations (which presumably includes the pace of buildout).

[25/] NPRM, 8 FCC Rcd at 2507 (emphasis added).

[26/] As noted in the SBMS August 12 Letter (at 7-8), Teletrac and MobileVision have received literally hundreds of wideband AVM authorizations pursuant to the interim rules; the Commission has granted extended implementation for most, if not all, of these authorizations.